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ABSTRACT

This chapter reviews the legal standards governing affirmative action in higher education, examining the diversity rationale and contrasting the cases of Hopwood v. Texas and Wittmer v. Peters, which were decided in 1996. It discusses: the legal standard governing affirmative action in higher education; the remedial interest in overcoming the present effects of past discrimination; the nonremedial interest in realizing the educational benefits of diversity; Hopwood v. Texas and its rejection of educational diversity; and Wittmer v. Peters and support for nonremedial affirmative action. It concludes that the law governing affirmative action in higher education is at a crucial point in its development. Several key cases are pending, and there is a strong chance that the Supreme Court will address the issue in the near future. The chapter notes that the higher education community must use this time to build upon the Supreme Court's 1978 decision in Regents of the University of California v. Bakke (which declared that a university's interest in securing the educational benefits that flow from student diversity is a compelling interest that can constitutionally support the use of race as a factor in student admissions) and develop its case for the educational value of diversity. (Contains 79 endnotes.) (SM)

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CHAPTER 3

Diversity and Affirmative Action: Evolving Principles and Continuing Legal Battles

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Introduction

In the U.S. Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*,[1] Justice Lewis Powell, in an opinion that came to be known as the opinion of the Court, declared that a university's interest in securing the educational benefits that flow from diversity in its student body is a compelling interest that can constitutionally support the use of race as a factor in student admissions.[2] For the last two decades, public and private universities across the country have adopted this diversity rationale as their primary justification for affirmative action programs.[3]

Nearly twenty years after *Bakke*, however, the Fifth Circuit Court of Appeals in *Hopwood v. Texas*[4] rejected the notion that promoting educational diversity is a compelling interest, striking down the affirmative action admissions program at the University of Texas School of Law. A divided panel in *Hopwood* held:

> We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that nonremedial interests will never justify racial classifications. Finally, the classifications of persons on the basis of race for

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the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.[5]

This conflict between *Bakke* and *Hopwood* constitutes the heart of the current legal debate regarding affirmative action in higher education. Several decisions by the Supreme Court establish a trend toward the rigid application of "strict scrutiny" in evaluating all race-based policies and programs.[6] Some legal commentators have argued that this trend may "sound the death knell" for affirmative action in higher education.[7] *Hopwood* is obviously a manifestation of that view.

There is, however, a competing conception of the legal status of affirmative action based on the notion, recently endorsed by a majority of the Court, that strict scrutiny is not "fatal in fact."[8] That view is embodied in the case of *Wittmer v. Peters*,[9] which was decided the same year as *Hopwood*. In *Wittmer*, the Seventh Circuit Court of Appeals upheld an affirmative action employment program for correctional officers at a juvenile "boot camp" in order to further the state's interest in the "pacification and reformation" of youth offenders. *Wittmer*, though occurring outside the higher education context, provides a powerful rebuttal to *Hopwood*. Moreover, while some affirmative action programs in education have recently been held unconstitutional,[10] several courts have also recognized that *Bakke* remains good law and have held or presumed that the nonremedial interest in promoting the educational benefits of diversity, as well as other, related nonremedial interests, can be sufficiently compelling to justify affirmative action.[11]

This chapter provides a brief overview of the legal standards governing affirmative action in higher education, focusing specifically on the diversity rationale, and contrasts the cases of *Hopwood* and *Wittmer*.

The Legal Standard Governing Affirmative Action in Higher Education: Strict Scrutiny

The Supreme Court has established under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 that race-based policies or programs will be upheld only where they pass so-called strict scrutiny, which requires that the given affirmative action program serve a compelling interest and be narrowly tailored to achieve that interest.[12] "In short, the compelling interest inquiry centers on 'ends' and asks *why* the government is classifying individuals on the basis of race or ethnicity; the narrow tailoring focuses on 'means' and asks *how* the government is seeking to meet the objective of the racial or ethnic classification."[13] Furthermore,

to ensure that legitimate compelling interests for affirmative action are not used as pretexts for discrimination, the Court requires a sufficient "basis in evidence" for the belief that a voluntary affirmative action program is warranted.[14]

In the context of higher education, and more generally, the Supreme Court has to date found only two interests sufficiently compelling to justify voluntary, race-based affirmative action: 1) remedying the present effects of past discrimination[15] and 2), under Justice Powell's opinion in *Bakke*, realizing the educational benefits that flow from a racially diverse student body.[16] The Court has also rejected several interests as insufficient to justify race-based actions. Most significantly, the Rehnquist Court has repeatedly held that the interest in remedying so-called societal discrimination is insufficient to justify affirmative action by any entity except perhaps the federal government: "[A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and overexpansive." [17]

Assuming that a given affirmative action program is found to serve a compelling interest, the Court has identified several factors to be considered in determining whether the program is narrowly tailored to achieve that interest:

> As it has been applied by the courts, the factors that typically make up the "narrow tailoring" test are as follows: [1] whether the government considered race-neutral alternatives before resorting to race-conscious action; [2] the scope of the affirmative action program and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; [3] the manner in which [it] is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process; [4] the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; [5] the duration of the program and whether it is subject to periodic review; and [6] the degree and type of burden caused by the program.[18]

The Remedial Interest in Overcoming the Present Effects of Past Discrimination

Affirmative action originated more than thirty years ago as a remedial effort to overcome the effects of discrimination. Today, a solid majority of the Supreme Court agrees that this interest remains sufficiently compelling to support race-based affirmative action.[19] The real debate is over the

scope of this interest: What "past discrimination" is sufficient to justify affirmative action? What "present effects" are sufficient? What evidentiary link must be established between the past discrimination and the present effects? In examining these questions in the context of higher education, it is useful to distinguish between when a university *must* take affirmative action to overcome the present effects of past discrimination and when it *may* take such action.

The Supreme Court in *United States v. Fordice*[20] defined what remedial actions *must* be taken by states that maintained prior *de jure* segregated systems of higher education. *Fordice* involved a challenge to Mississippi's university system alleging that the state had failed to take sufficient steps to dismantle its prior *de jure* segregated system. Mississippi adopted facially race-neutral university admissions policies in the 1960s, but by the mid-1980s, Mississippi's university system remained racially segregated.[21] The Court in *Fordice* held:

> [A] State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation. . . . If policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.[22]

Fordice thus requires states to do more to desegregate their universities than simply adopt facially race-neutral admissions policies. Rather, states must at a minimum seek to establish effective neutrality.[23]

The legal standard governing what affirmative actions a university *may* take voluntarily to remedy the present effects of past discrimination is somewhat less clear. The Supreme Court cases most on point are *Wygant v. Jackson Board of Education*,[24] which concerned the use of affirmative action in faculty employment, and *Richmond v. J. A. Croson Co.*,[25] which concerned the use of affirmative action in government contracting.

In *Wygant*, the Court held unconstitutional a collective bargaining agreement that gave special protection to minority teachers against layoffs in order to "remedy societal discrimination by providing 'role models' for minority schoolchildren."[26] In a plurality opinion, the Court rejected this interest, and suggested that only an actor's interest in overcoming its own prior discrimination could constitutionally support such race-based action.[27] The Jackson Board did not have sufficient evidence of such prior discrimination.[28] Furthermore, a plurality held that the affirmative action plan at issue was not narrowly tailored, in any case, because layoffs were too great a price for nonminorities to bear.[29]

Three years later, in *Croson*, the Court held unconstitutional the Richmond City Council's Minority Business Utilization Plan, which required a 30 percent minority set-aside for all city-awarded construction contracts in order to remedy past discrimination in the construction industry.[30] Again, the Court rejected this interest in overcoming societal discrimination.[31] In addition, the Court held that the city's plan was not narrowly tailored because there had been no consideration of available race-neutral means and because the 30 percent set-aside was not tied to any goal "except perhaps outright racial balancing."[32] Finally, speaking for a plurality, Justice O'Connor clarified that the Richmond City Council was not restricted to remedying its own prior discrimination but could, given the proper basis in evidence indicating that such action was necessary, also act to eliminate private discrimination within its jurisdiction.[33]

Though employment and contracting are not the same as higher education admissions, three general principles regarding voluntary remedial affirmative action may be gleaned from the Supreme Court's decisions in *Wygant* and *Croson*. First, a university cannot take affirmative action to remedy the effects of general societal discrimination. Second, a university can take affirmative action to remedy the present effects of its own past discrimination if it has a sufficient basis in evidence for the belief that such action is warranted. Third, a university or other state entity can take affirmative action to remedy prior discrimination by other actors to avoid serving as a "passive participant" in a pattern of discrimination, specifically where affirmative action is taken by a government entity seeking to ameliorate the effects of discrimination within its jurisdiction.

Wygant and *Croson* arguably left some important room for the adoption of voluntary affirmative action programs designed to remedy the present effects of past discrimination, especially by institutions that had previously been *de jure* segregated. However, some lower federal courts applying these holdings in the context of higher education have applied them rigidly, and have thus greatly restricted remedial affirmative action programs at universities in those circuits.

First, in *Podberesky v. Kirwan*,[34] the Fourth Circuit Court of Appeals held unconstitutional the University of Maryland's Banneker scholarship program, a merit scholarship program open only to African American students. The University of Maryland defended the Banneker program as necessary to remedy the present effects of its own past discrimination. The university had previously been *de jure* segregated and offered proof that four present effects of past discrimination existed:

> (1) The University has a poor reputation within the African-American community; (2) African-Americans are underrepresented in the student population; (3) African-American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students.[35]

However, the Fourth Circuit held that, to sustain affirmative action, the university was required to show not only proof of prior discrimination and present effects, but also proof that the present effects were caused by the prior discrimination, as opposed to general societal discrimination, and that the present effects were sufficient to justify the affirmative action program at issue.[36] The Fourth Circuit held that the University of Maryland was unable to establish these evidentiary links and thus rejected the university's race-based scholarship program.

Second, in *Hopwood v. Texas*,[37] the Fifth Circuit Court of Appeals held unconstitutional the affirmative action admissions program at the University of Texas School of Law. The law school defended its affirmative action admissions program based in part on the need to remedy the present effects of past discrimination—not only its own discrimination but also prior discrimination perpetrated by Texas's primary and secondary school systems and by the University of Texas System as a whole.[38] The Fifth Circuit rejected the law school's arguments, requiring the University of Texas School of Law to justify its affirmative action admissions program based solely on its own prior discrimination.[39] Applying the standard established by the Fourth Circuit in *Podberesky*, the Fifth Circuit held that the "present effects" the law school identified, which were nearly identical to those identified by the University of Maryland in *Podberesky*, were not sufficiently linked to its own past discrimination and could not serve to justify the affirmative action admissions program at issue.[40]

Finally, in the case of *Wessmann v. Gittens*,[41] which involved affirmative action in the primary and secondary school context, the First Circuit Court of Appeals implicitly adopted the *Podberesky* standard over a vigorous dissent and held unconstitutional the Boston Latin School's affirmative action admissions policy. The court accepted that Boston Latin, as part of the Boston public school system, had discriminated in the past and that racial gaps in tests scores were a valid "present effect."[42] However, the majority found that the Boston School Committee had not proven that the present effects were caused by the prior discrimination or that affirmative action was an appropriate remedy to ameliorate those effects.[43]

The legal standard for remedial affirmative action established in *Podberesky* and applied again in *Hopwood* and *Wessmann* expands greatly on the Supreme Court's holdings in *Wygant* and *Croson* and has not yet been endorsed by the Court. If this standard becomes the law of the land, it is unclear how a university can provide sufficient evidence to support affirmative action to overcome the present effects of past discrimination.[44] Perhaps the only clearly established method to prove a link between past discrimination and present effects in the context of higher education admissions is by showing a policy or practice emanating from the *de jure* era that continues to have discriminatory effects, in which case the university is *required* to take remedial action under *United States v. Fordice*.[45] In this sense, *Podberesky*, *Hopwood*, and *Wessmann* may mean that there are now only two classes of remedial affirmative action programs at universities and/or schools in the Fourth, Fifth, and First Circuits—those that are required under *Fordice* and those that are not allowed under *Podberesky* and its progeny. This possibility puts great pressure on the diversity rationale for affirmative action in higher education in those circuits.

The Nonremedial Interest in Realizing the Educational Benefits of Diversity

Unlike the remedial interest in overcoming the present effects of past discrimination, the nonremedial interest in promoting the educational benefits of diversity seeks to justify affirmative action not as a remedy to make up for past discrimination against a certain group, but as a forward-looking tool that is necessary to promote the educational development of all students. In *Regents of the University of California v. Bakke*,[46] Justice Powell, in his landmark opinion, held that securing the educational benefits that flow from diversity in higher education is a compelling interest that can constitutionally support race-based affirmative action in student admissions.[47] *Bakke* involved a challenge under the Fourteenth Amendment and Title VI to the affirmative action admissions program at the University of California at Davis Medical School. Each year, the Davis admissions program reserved sixteen places in its 100-student entering class for minority students, who were admitted through a special admissions process.

In a fractured opinion, four justices in *Bakke* held that Title VI was coextensive with the Fourteenth Amendment and that the Davis admissions program was constitutional in all respects;[48] four different justices held that the case was governed exclusively by Title VI, that Title VI prohibited all considerations of race in the administration of programs receiving federal funds, and that the Davis admissions program was there-

fore unlawful.[49] Announcing the judgment of the Court, Justice Powell, as the swing vote, joined the former four justices in holding that the Fourteenth Amendment and Title VI were coextensive and that the medical school was not fully prohibited from considering race in its admissions process. However, Justice Powell joined the latter four justices in declaring the Davis admissions program unconstitutional because it was not narrowly tailored to promote what Justice Powell identified as the medical school's compelling interest, promoting the educational benefits of diversity.[50]

According to Justice Powell, the Davis Medical School's interest in promoting educational diversity was sufficiently compelling to support affirmative action in student admissions.[51] "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is," he wrote, "widely believed to be promoted by a diverse student body."[52] Justice Powell found the medical school's interest in educational diversity to be supported by the First Amendment interest in academic freedom, which protects the authority of universities to make their own educational judgments concerning "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[53]

However, according to Justice Powell, the type of educational diversity that constituted a compelling interest was not pluralistic diversity of certain racial groups, but more individualistic diversity in which race is "but a single though important element":[54] "Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[55] Therefore, a narrowly tailored affirmative action program designed to promote educational diversity would not rely on rigid racial quotas or a separate admissions process.[56]

As a result of Justice Powell's opinion in *Bakke*, public and private universities have for the last two decades adopted this diversity rationale as their primary justification for affirmative action programs.[57] However, given the fractured holding of the Court in *Bakke* and the absence of additional guidance from the Court since then, the status of the diversity rationale has remained in some doubt. Furthermore, several decisions by the Court, specifically *Adarand v. Pena*,[58] establish that strict scrutiny applies to all race-based affirmative action programs, whether they are adopted by federal, state, or local government actors, and whether they serve "benign" or "invidious" goals. Finally, dicta from some opinions suggest that only the remedial interest in overcoming the present effects of past discrimination can be sufficiently "compelling" to justify affirma-

tive action.[59] In *Hopwood v. Texas*,[60] the Fifth Circuit Court of Appeals seized on these developments and effectively "overruled" *Bakke* by rejecting educational diversity as a compelling interest.

Hopwood v. Texas and Its Rejection of Educational Diversity

In *Hopwood v. Texas*, as discussed above, the Fifth Circuit Court of Appeals held unconstitutional the affirmative action admissions program at the University of Texas School of Law. The law school's admissions system evaluated African American and Mexican American applicants separately from other applicants based on reduced admissions standards.[61] The law school defended its affirmative action admissions program based in part on *Bakke*'s diversity rationale. It was relatively clear that the law school's admissions program did not meet the narrow tailoring requirements laid out in *Bakke*. Nonetheless, a majority of the panel eschewed this more narrow ground for holding the law school's admissions program unconstitutional. "[T]enuously stringing together pieces and shards of recent Supreme Court opinions,"[62] a divided panel in *Hopwood* rejected educational diversity as a compelling interest that can justify affirmative action in higher education.

The Fifth Circuit's rejection in *Hopwood* of the diversity rationale proceeded in three stages. First, the court held that Justice Powell's decision in *Bakke* garnered only his vote and, therefore, was not binding precedent.[63] Second, the court held that recent Supreme Court precedent indicated that the *only* potentially compelling interest was overcoming the present effects of past discrimination, and that educational diversity was, therefore, not compelling.[64] Third, the court held, without evidentiary support, that race is as irrelevant to university admissions as blood type, that the use of race in university admissions improperly stereotypes minority applicants, and that the use of race fuels racial hostility.[65] The court concluded, "In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."[66]

The *Hopwood* decision can be criticized on numerous grounds, but the most important point to note here is that *Hopwood* is not the end of the story. In *Wittmer v. Peters*,[67] Chief Judge Richard Posner and the Seventh Circuit offer a vastly different and largely persuasive view of the present state of nonremedial affirmative action programs under the Supreme Court's jurisprudence.

Wittmer v. Peters and Support for Nonremedial Affirmative Action

In *Wittmer v. Peters*, the Seventh Circuit upheld an affirmative action employment program for correctional officers at a "boot camp" for youth offenders. The affirmative action program was intended to promote qualified black correctional officers to vacant lieutenant positions in order to facilitate the penological goals of the boot camp.[68] The defendant state official, warden of the youth detention center, presented expert evidence that the boot camp program was not likely to be successful without some black officers in supervisory positions.

Chief Judge Posner, writing for a unanimous court, upheld the affirmative action employment program, finding it narrowly tailored to serve a compelling interest.[69] First, the court rejected the plaintiffs' contention, embraced by the Fifth Circuit in *Hopwood*, that recent Supreme Court precedent indicated that only the remedial interest in overcoming the present effects of past discrimination could ever justify race-based affirmative action:

> The plaintiffs argue that the only form of racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of past discrimination by the public institution that is asking to be allowed to try this dangerous cure. There is dicta to this effect. And certainly it is the most frequently mentioned example of a case in which discrimination is permissible. But there is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for discrimination and expressed that rejection in sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored. . . . [T]he rectification of past discrimination is not the only setting in which government officials can lawfully take race into account.[70]

Second, the court implicitly held that the state's interest in the "pacification and reformation" of youth offenders was sufficiently compelling

to justify affirmative action.[71] In so holding, the court noted that a majority of the Supreme Court had recently endorsed the idea that strict scrutiny is not inevitably "fatal in fact."[72] Furthermore, the court placed great weight on the fact that the defense presented sufficient expert evidence of the penological necessity of the affirmative action program. On this latter point, the court said:

> It is not enough to say that of course there should be some correspondence between the racial composition of a prison's population and the racial composition of the staff; common sense is not enough; common sense undergirded the pernicious discrimination against blacks now universally regretted. . . . In any event that is not the justification advanced. The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts—recognized experts in the field of prison administration—did not rely on generalities about racial balance or diversity; did not for that matter, defend a global racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.[73]

Wittmer and *Hopwood* obviously evaluate different nonremedial interests and different programs designed to achieve those interests. Nonetheless, *Wittmer* establishes, at least in the Seventh Circuit, that nonremedial interests can be sufficiently compelling to justify affirmative action. *Wittmer* also confirms that a sufficient basis in evidence can be established to justify nonremedial affirmative action. Furthermore, while *Wittmer* does not speak directly to whether educational diversity constitutes a compelling interest in the higher education context, it would be somewhat puzzling if the interest in rehabilitating youth offenders was sufficiently compelling to justify affirmative action, but the interest in promoting the educational and socio-moral development of university students was not so compelling. Correctional facilities may be unique institutions, but so are universities.

Finally, several recent cases follow on *Wittmer* and further rebut *Hopwood*. Most directly on point is *Smith v. University of Washington Law School*.[74] In *Smith*, the U.S. Court of Appeals for the Ninth Circuit held that Justice Powell's opinion in *Bakke* constitutes binding precedent es-

tablishing that a university's nonremedial interest in promoting the educational benefits of diversity can be sufficiently compelling to justify affirmative action. According to the Ninth Circuit:

> The district court correctly decided that Justice Powell's opinion in *Bakke* described the law and would require a determination that a properly designed and operated race-conscious admissions program at the law school of the University of Washington would not be in violation of Title VI or the Fourteenth Amendment. It was also correct when it determined that *Bakke* has not been overruled by the Supreme Court. Thus, at our level of the judicial system Justice Powell's opinion remains the law.[75]

Furthermore, in *Gratz v. Bollinger*,[76] the U.S. District Court for the Eastern District of Michigan recently upheld the University of Michigan's current affirmative action admissions policy because the university presented "solid evidence" that it has a compelling interest in promoting the educational benefits of diversity. The court said, "This Court is persuaded, based upon the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny."[77] In *Johnson v. Board of Regents of the University System of Georgia*, however, the U.S. District Court for the Southern District of Georgia rejected Justice Powell's diversity rationale for affirmative action at the University of Georgia.[78]

Conclusion

This brief legal overview indicates that the law governing affirmative action in higher education is at a crucial point in its development. Several key cases are pending,[79] and there is a strong chance that the Supreme Court will address the issue in the near future. The higher education community must, therefore, use this time to build upon Justice Powell's opinion in *Regents of the University of California v. Bakke* and develop its case for the educational value of diversity.

Notes

1. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
2. See id. at 312–15 (opinion of Powell, J.).
3. See, for example, Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 Annual Survey of American Law 515, 536 (1996) ("Although affirmative action was created specifically for remedial purposes, today the

primary, and perhaps only, justification for the retention of affirmative action programs is educational diversity.").

4. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).
5. Id. at 944.
6. See, for example, *Adarand v. Pena*, 515 U.S. 200 (1995).
7. For example, Leland Ware, *Tales from the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?*, 23 Journal of College and University Law 43, 44 (1996); Donald L. Beschle, *"You've Got to Be Carefully Taught": Justifying Affirmative Action after Croson and Adarand*, 74 North Carolina Law Review 1141, 1180 (1996).
8. For example, *Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment))); id. at 275 (Ginsburg, J., dissenting, joined by Breyer, J.).
9. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).
10. For example, *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (holding unconstitutional the Boston Latin School's affirmative action admissions policy because it was not narrowly tailored); *Tuttle v. Arlington County School Board*, 189 F.3d 431 (4th Cir. 1999) (holding unconstitutional the Arlington Traditional School's affirmative action admissions policy because it was not narrowly tailored); *Eisenberg v. Montgomery County Public Schools*, 1999 WL 795652 (4th Cir. 1999) (holding unconstitutional the Montgomery County, Maryland, student assignment policy because it was not narrowly tailored); *Johnson v. Board of Regents of the University of Georgia System*, 106 F.Supp.2d 1362 (S.D. Ga. 2000) (holding that the University of Georgia's affirmative action admissions policy violated Title VI of the Civil Rights Act of 1964).
11. See, for example, *Smith v. University of Washington Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that Justice Powell's decision in *Bakke* is binding precedent and denying, in part, plaintiff's motion for summary judgement in a suit challenging the University of Washington Law School's prior affirmative action admissions policy) ("[T]he Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures."); *Wessmann*, 160 F.3d at 796 ("It may be that the *Hopwood* panel is correct and that, were the [Supreme] Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification. It has not done so yet, however, and we are not prepared to make such a declaration in the absence of a clear signal that we should. . . . Instead, we assume arguendo—but we do not decide—that *Bakke* remains good law and that some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions."); *Tuttle*, 189 F.3d at 439 ("We have interpreted *Bakke* as holding that the state 'is not absolutely barred from giving any consideration to race' in a non-remedial context. Although no other Justice joined the diversity portion of Powell's concurrence, nothing in *Bakke* or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest. Until the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest . . ."); *University and Community College System of Nevada v. Farmer*, 930 P.2d 730, 734-35 (Nev. 1997)), *cert. denied*, 118 S. Ct. 1186 (1998) (upholding against a Title VII challenge the University's affirmative action faculty employment policy) ("[T]he *Bakke* plurality held that in the limited setting of a graduate

school, an attempt to attain a diverse student body through a preferential treatment admissions policy is not per se unconstitutional as long as race is one of several factors used in evaluating applicants. . . . We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court."); *Brewer v. West Irondequoit Central School District*, 2000 U.S. App. LEXIS 9866 (2d Cir. 2000) (holding that the State's interest in reducing *de facto* segregation is a compelling interest that can justify the use of race in student assignment policies) ("[T]he Fifth Circuit is the only circuit since *Bakke* to hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context. . . . More importantly, this Circuit has not previously taken the position that diversity, or other non-remedial state interests, can never be compelling in the educational setting. In fact, binding precedent in this Circuit . . . explicitly establishes that reducing *de facto* segregation . . . serves a compelling government interest."); *Hunter v. Regents of the University of California*, 190 F.3d 1061, n.6 (9th Cir. 1999) (upholding the use of race in student assignment to an elementary school operated by UCLA to support the state's compelling interest in promoting and disseminating research to improve urban education) ("The appellant argues that only an interest in remedying past discrimination can justify [the school's] use of race/ethnicity as one of a number of factors in its admissions process. We disagree. The Supreme Court has never held that only a state's interest in remedial action can meet strict scrutiny."); *Gratz v. Bollinger*, 122 F.Supp.2d 811, 824 (E.D. Mich. 2000) (holding that the University of Michigan had established that its interest in educational diversity is sufficiently compelling to justify its current affirmative action admissions policy) ("The Court is persuaded, based on the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny."). But see, for example, *Johnson*, 106 F.Supp.2d at 1371 (holding that the University of Georgia's affirmative action admissions policy violates Title VI because the university's diversity rationale is "amorphous at best" and, therefore, not compelling).

12. For example, *Adarand*, 515 U.S. at 235.
13. Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, to General Counsels 10 (June 28, 1995).
14. See, for example, *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277–78 (1986); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500 (1989). See also, for example, Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harvard Civil Rights-Civil Liberties Law Review 381, 409 (1998) ("[T]he function of the evidentiary hurdles within the 'compelling interest' test is to smoke out unconstitutional motivations that take the form of 'simple racial politics,' 'illegitimate racial prejudice,' or 'unthinking racial stereotypes.'").
15. See, for example, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action program.").
16. *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.). See also *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest; *Smith*, 233 F.3d at 1201 (holding that Justice Powell's opinion in Bakke is binding precedent). But see, for example, *Hop-*

wood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (rejecting the idea that Justice Powell's statement concerning educational diversity constituted a holding of the Court).

17. *Wygant*, 476 U.S. at 276. The Court has also held that a school's interest in providing "role models" for minority students is insufficient to justify affirmative action in faculty hiring. *Wygant*, 476 U.S. at 274–76 (plurality opinion). The Court seemed to equate this goal with the goal of alleviating general societal discrimination, and the interest in promoting educational diversity was expressly distinguished. Id. at 289 n.*(O'Connor, J., concurring). In *Bakke*, Justice Powell declared that the interest in increasing the number of minorities in a given profession is insufficient to justify affirmative action by a university. Justice Powell's analysis of this interest, however, was cursory; he seemed to view this goal as equivalent to valuing race for race's sake. Justice Powell also presumed in *Bakke* that the interest in increasing the number of medical professionals practicing in underserved areas *could* be sufficiently compelling to justify affirmative action by a university, but Justice Powell found no evidence that the program at issue in *Bakke* was necessary or designed to achieve that goal. *Bakke*, 438 U.S. at 310–11.
18. Memorandum from Walter Dellinger, *supra* note 13, at 19–20. See also *U.S. v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); id. at 187 (Powell, J., concurring). Not every factor will likely be relevant in every case. Memorandum from Walter Dellinger, *supra* note 13, at 19–20.
19. For example, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). All of the justices would likely agree that where present, intentional discrimination has been established, some form of prospective race-based remedy can be appropriate. But they differ in the extent to which they approve of group-based remedies to correct for past injustices against other members of a group. Nonetheless, only Justice Scalia and perhaps Justice Thomas have "adopted anything that approaches a blanket prohibition on race-conscious remedies." Memorandum from Walter Dellinger, *supra* note 13, at 6.
20. *United States v. Fordice*, 505 U.S. 717 (1992).
21. Id. at 724–25.
22. Id. at 728–29 (holding several policies of Mississippi's university system "constitutionally suspect" under this standard).
23. The Court's holding in *Fordice* can best be understood in the context of earlier Supreme Court decisions concerning the obligation of prior *de jure* segregated institutions to desegregate. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court held with regard to primary and secondary schools that "separate educational facilities are *inherently* unequal." Id. at 495 (emphasis added). States that had been operating *de jure* segregated systems of education at the time of *Brown* had an affirmative obligation to cure the effects of that prior segregation. See, for example, *Green v. New Kent County School Board*, 391 U.S. 430, 437–38 (1968) ("School boards . . . operating state-compelled dual systems [at the time of *Brown*] were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"). However, in *Bazemore v. Friday*, 478 U.S. 385 (1986), the Court held with regard to state-funded and -operated clubs that had been *de jure* segregated that states had an obligation only to adopt facially race-neutral membership policies. Thus, the question in *Fordice* was, in effect, whether colleges and universities were more like primary and secondary schools or like voluntary clubs. One way to understand the decision in *Fordice* is that the Court adopted a middle ground. *Fordice* in effect creates a presumption that any university practice emanat-

ing from the *de jure* segregated era and continuing to have discriminatory effects is viewed as intentional discrimination and is thus subject to strict scrutiny. This reading of *Fordice* is perhaps modest because it is not that different from other cases that have held that the intent to discriminate is judged from the time at which the law or policy at issue was originally adopted. See, for example, *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding unconstitutional a provision of the Alabama Constitution of 1901, which disenfranchised persons convicted of crimes of moral turpitude, based on general evidence that the provision was originally enacted for a discriminatory purpose).

24. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).
25. *Richmond v. J. A. Croson*, 488 U.S. 469 (1989).
26. *Wygant*, 476 U.S. at 269–84 (plurality opinion).
27. Id. at 274 ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification, rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.").
28. Id. at 272.
29. Id. at 283.
30. *Croson*, 488 U.S. at 476–511.
31. See id. at 500–02.
32. Id. at 507–08.
33. Id. at 491–92 (plurality opinion) ("[A] state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. . . . Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.").
34. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).
35. Id. at 152.
36. Id. at 153–54.
37. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).
38. Id. at 948. The law school's reasoning was likely that it is merely a part of the overall system of education administered by the State of Texas, and by permitting affirmative action at the law school, the state was merely acting to remedy discrimination in one part of its education system that had discriminatory effects in another. See id. at 953–54.
39. Id. at 948–52. According to the court, "Even if, arguendo, the state is the proper government unit to scrutinize, the law school's admissions program would not withstand our review. For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the 'plus' given to applicants to remedy that harm." Id. at 951.
40. Id. at 952–55. The "present effects" identified by the University of Texas School of Law included "[1] the law school's lingering reputation in the minority community, particularly with prospective students, as a 'white' school; [2] an underrepresentation of minorities in the student body; and [3] some perception that the law school is a hostile environment for minorities." Id. at 951 (quoting *Hopwood v. Texas*, 881 F. Supp. 551, 572 (W.D. Tex. 1994)).
41. *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).
42. Id. at 800–01.

43. Id. at 802–08. In dissent, Judge Lipez argued that the Boston Latin program was justified by the school's remedial interest in overcoming the present effects of past discrimination, and that the majority had adopted the wrong standard in requiring the defendant School Committee, rather than the plaintiff, to prove the link between prior discrimination and present effects:

> In my view, the majority judges the Committee's proof of causation unsatisfactory because the majority misperceives the Committee's evidentiary burden in defending its affirmative action program. . . . A government entity need not admit conclusive guilt for past discrimination's current effects before going forward with a remedial plan. Instead, it must satisfy the court that the evidence before it established a prima facie case of a causal link between past discrimination and the current outcomes addressed by the remedial program. If this prima facie case is not effectively rebutted by a reverse discrimination plaintiff, who always retains the burden of proving illegality of the affirmative action program, the government has met its burden of establishing a compelling interest under strict scrutiny analysis.

44. See, for example, Murphy, *supra* note 3, at 515 ("This strict standard of review and the seemingly impossible factual basis necessary to satisfy this heightened scrutiny imply that remedial action in higher education is no longer a valid justification for affirmative action.").
45. See *supra* text accompanying notes 20–23.
46. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
47. Id. at 312–15 (opinion of Powell, J.).
48. See id. at 324–79 (Brennan, J., concurring in part and dissenting in part, joined by White, Marshall, & Blackmun, J. J.).
49. See id. at 408-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C. J., and Rehnquist & Stewart, J. J.).
50. See id. at 271–72 (opinion of Powell, J.).
51. Id. at 311–12.
52. Id. at 312.
53. Id. at 312–13 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).
54. Id. at 315.
55. Id. at 314.
56. See id. at 316–18.
57. See, for example, Murphy, *supra* note 3, at 536.
58. *Adarand v. Pena*, 515 U.S. 200 (1995).
59. See, for example, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (overruled in part by *Adarand*, 515 U.S. 200 (1995)) (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination.").
60. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).
61. See id. at 934–38 (explaining the University of Texas School of Law's admissions process).
62. *Hopwood v. Texas* ("Hopwood II"), 84 F.3d 720, 722 (5th Cir. 1996) (Politz, J., dissenting from denial of rehearing en banc) ("The majority of the panel [in *Hopwood*] overruled *Bakke*, wrote far too broadly, and spoke a plethora of unfortunate dicta.").
63. *Hopwood*, 78 F.3d at 944.
64. Id. at 944–45.

65. Id. at 945–46.
66. Id. at 948.
67. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).
68. See id. at 917. ("The idea [of the boot camp] is to give inmates an experience similar to that of old-fashioned military basic training, in which harsh regimentation, including drill-sergeant abuse by correctional officers, is used to break down and remold the character of the trainee.")
69. See id. at 918–19.
70. Id. at 919 (criticizing *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996)) (other citations omitted).
71. See id. at 920.
72. Id. at 918. See also *Adarand*, 515 U.S. at 237; id. at 275 (Ginsburg, J., dissenting, joined by Breyer, J.).
73. Id. at 919–20. Of potentially great relevance to making the case for educational diversity as a compelling interest, the court, in deciding how much and what type of evidence was necessary to justify the affirmative action program at issue, expressly recognized that the amount and type of evidence required was dependent upon the amount and type of evidence available. Id. at 920. The court did suggest that "after correctional boot camps have been around long enough to enable thorough academic (or academic-quality) study of the racial problems involved in their administration, prison officials can[not] continue to coast on expert evidence that extrapolates to boot camps from the experts' research on conventional prisons." Id. at 920–21. However, the court also recognized that boot camps have been in existence since 1983, and it still upheld the affirmative action program at issue based on limited direct evidence. Id. at 921.
74. *Smith*, 233 F.3d at 1188 (denying, in part, plaintiff's motion for summary judgment in a suit challenging the University of Washington Law School's prior affirmative action admissions policy).
75. Id. at 1201. See also, for example, *Hunter v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999) (upholding the use of race in student assignment to an elementary school operated by UCLA to support the state's nonremedial compelling interest in promoting and disseminating research to improve urban education); *Brewer v. West Irondequit Central* 2000 U.S. App. LEXIS 9866 (2d Cir. 2000) (holding that the state's nonremedial interest in reducing *de facto* segregation is a compelling interest that can justify the use of race in student assignment policies).
76. *Gratz*, 122 F.Supp.2d at 811.
77. Id. at 824.
78. *Johnson*, 106 F.Supp.2d at 1375 (holding that Justice Powell's opinion was not binding precedent and that the university's interest in educational diversity was too "amorphous" to be compelling).
79. See, for example, *Smith*, 233 F.3d at 1188 (University of Washington Law School); *Gratz*, 122 F.Supp.2d at 811 (University of Michigan); *Johnson*, 106 F.Supp.2d at 1362 (University of Georgia); *Grutter v. Bollinger*, 97-72598 (E.D. Mich.) (challenging the University of Michigan Law School's affirmative action admissions policy).

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